No. 86-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF INDIANA,

Intervenor-Appellant,

vs.

DYNAMICS CORPORATION OF AMERICA, et al.,

Appellee.

On Appeal from the United States Court of Appeals
for the Seventh Circuit

JURISDICTIONAL STATEMENT OF INTERVENOR-APPELLANT STATE OF INDIANA

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July 22, 1986

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QUESTIONS PRESENTED

1. Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of all shareholders other than the acquiring entity and incumbent management, is unconstitutional under the Supremacy Clause because preempted by the Williams Act, 15 U.S.C. §§ 78(m)(d)-78(m)(e), 78(n)(d)-78(n)(f) (1981), which Federal statute regulates only disclosures to shareholders and the purchase of shares in tender offers.

2. Whether the Control Share Acquisitions Chapter, which does not

discriminate against interstate commerce or out-of-state residents, applies only to Indiana corporations with other substantial ties to the State, and regulates shareholder voting rights as a matter of the State's general corporation law governing the internal affairs of Indiana corporations, is unconstitutional under the Commerce Clause.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was issued on April 9, 1986. It is contained in the Appendix to a Jurisdictional Statement filed with this Court in this action by Appellant CTS Corporation at A29*. The supplemental opinion of the District Court was issued on April 16, 1986. (CTS App. A88) The final opinion of the United States Court

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* References to "(CTS App. _____)" are to the Appendix submitted in connection with the Jurisdictional Statement of CTS Corporation, upon which the Intervenor-Appellant relies.

of Appeals for the Seventh Circuit was issued on June 9, 1986.* (CTS App. A1)

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* Rule 15.1.(b) LISTING: In Seventh Circuit No. 86-1601, containing the constitutional issues presented by this appeal, the parties were Dynamics Corporation of America ("DCA") as Plaintiff-Appellee; CTS Corporation ("CTS") and Robert Hostetler, Gary Erekson, and Joseph DiGirolamo, in their respective capacities as officers and/or directors of CTS, as Defendants-Appellants; and the State of Indiana, as Intervenor-Appellant. Seventh Circuit No. 1608 involved the same action in the District Court, and was consolidated with No. 86-1601 for decision by the Seventh Circuit (App. A13), but did not involve the questions presented in this appeal.

Rule 28.4.(c) Listing: By its Memorandum Opinion and Order in Dynamics Corporation of America v. CTS Corporation, No. 86-C-1624, slip op. (N.D. Ill. April 16, 1986), the United States District Court for the Northern District of Illinois, Eastern Division, certified the judgment in that case for immediate appeal and certified the "appeal" under 28 U.S.C. § 2403(b) (West 1985) to the Indiana Attorney General for purposes of intervention. (CTS App. 125)

JURISDICTION

This civil action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, by Appellee Dynamics Corporation of America ("DCA") against Appellant CTS Corporation ("CTS") and others. As relevant to this appeal, the complaint alleged that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986) (the "Indiana Statute") is unconstitutional because it violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the Constitution of the United States. Federal jurisdiction was based upon 15 U.S.C. § 78aa, 28 U.S.C. §§ 1331 and

1332 (West 1986), and the doctrine of pendent jurisdiction.

In its opinions dated April 9 and April 16, 1986 the District Court held the Indiana Statute unconstitutional (CTS App. A88) and on April 16, 1986 entered judgment in favor of CTS on this issue. (CTS App. 139) By its opinion dated April 16, 1986 the District Court certified its judgment for immediate appeal under 28 U.S.C., Fed. R. Civ. P. 54(b) (West 1986). (CTS App. A124) By that same opinion the District Court also for the first time certified "the appeal" to the Attorney General of the State of Indiana pursuant to 28 U.S.C. § 2403(b) (West 1986). (CTS App. A124-25) That statute provides that a state is entitled to intervene in any action, suit or proceeding in a court of the United States "wherein the

constitutionality of any statute of that State affecting the public interest is drawn in question." Id. The Indiana Attorney General did not receive certification pursuant to 28 U.S.C. § 2403(b) until after the conclusion of proceedings in the District Court and was unable to present evidence or argument in the action. (CTS App. A89)

On April 19, 1986, Intervenor-Appellant filed a motion to intervene in an appeal taken by CTS to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") from the judgment of the District Court entered in accordance with its opinions holding the Indiana Statute to be unconstitutional on both Supremacy and Commerce Clause grounds.

(App. A7)* An order of the Seventh Circuit granting the state's motion to intervene was issued on April 22, 1986. (App. A11) On April 18, 1986, the Seventh Circuit consolidated the various appeals for purposes of briefing and argument and granted Appellants' request for expedited appeal. (App. A13) On April 23, 1986, the Seventh Circuit entered its judgment and an order affirming the judgment of the District Court (CTS App. A126, A129) and on June 9, 1986 issued its opinion addressing the constitutional issues presented (CTS App. A1).

The State of Indiana timely filed a notice of appeal to this Court

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* References to "(App. ___)" are to the Appendix of Intervenor-Appellant filed with this Jurisdictional Statement.

in the Seventh Circuit on April 25, 1986. (App. A1) This Jurisdictional Statement is being filed in this Court within ninety days after the entry of the judgment from which this appeal is taken. 28 U.S.C. § 2101(c) (West 1986). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (West 1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First and Sixth Articles of the United States Constitution, the Williams Act of 1968 and the Indiana Business Corporation Law are set forth at page A140 of the Appendix to the Jurisdictional Statement of Appellant CTS Corporation filed in connection with this Appeal.

STATEMENT OF THE CASE

A. The Dynamics Corporation of America Tender Offer and Litigation.

Appellee Dynamics Corporation of America ("DCA"), a New York corporation with its principal place of business in Connecticut, announced a tender offer on March 10, 1986 for at least 1,000,000 of the approximately 5,700,000 outstanding voting shares of Appellant CTS Corporation ("CTS"), an Indiana corporation with its principal place of business in Indiana. As DCA already owned approximately 9.6% of CTS' outstanding voting shares, consummation of the tender offer would have given it approximately 27.5% of such shares. On the same date DCA announced a proxy contest to elect its own candidates to the CTS board of directors at CTS'

annual meeting scheduled for April 25, 1986.

On March 10, 1986, DCA filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, which originally alleged claims unrelated to this appeal. Upon CTS' election to be governed by the new Indiana Business Corporation Law, including the Control Share Acquisitions Chapter described below, DCA amended its complaint to seek an injunction against enforcement of the Chapter on the ground that its provisions are unconstitutional.

B. The Control Share Acquisitions Chapter of the Indiana Business Corporation Law.

On March 4, 1986, Indiana enacted a new Business Corporation Law, Ind. Code Ann. §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), which revises

the State's corporation code and which contains a chapter entitled "Control Share Acquisitions". Ind. Code Ann. §§ 23-1-42-1 to -11 (CTS App. A167) (the "Indiana Statute"). While the new law becomes applicable to all Indiana corporations on August 1, 1987, corporations may elect to be governed by its provisions prior to that date. Ind. Code Ann. § 23-1-17-3. CTS elected to be governed by the new law effective April 2, 1986.

The Indiana Statute applies by its terms to any Indiana corporation*

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* The term "corporation" is defined for purposes of the Business Corporation Law, including the Control Share Acquisitions Chapter, as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this Article." Ind. Code Ann. § 23-1-20-5. The Seventh Circuit recognized in its opinion

with 100 or more shareholders that has its principal place of business, its principal office, or a substantial amount of its assets within Indiana. Application of the statute is further limited to corporations in which a substantial number of the shares are held by, or a substantial number of shareholders are, Indiana residents. Ind. Code Ann. § 23-1-42-4(a).

The Statute does not govern the purchase, sale or transfer of shares of stock of subject Indiana corporations. Rather, it supplements the portions of the new Indiana Business Corporation Law

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(footnote continued)

> that the Control Share Acquisitions Chapter applies only to corporations "incorporated in Indiana." (CTS App. A19)

governing voting rights of shareholders of Indiana corporations. The Statute governs the voting power of "control shares" which are defined as acquired voting shares which, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power--20%, 33.3% or 50%. A person who acquires control shares may not vote them until the shares are granted voting rights by a majority vote of the existing disinterested shareholders. The procedure for obtaining the requisite shareholder vote is described below.

THE QUESTIONS ARE SUBSTANTIAL

The Control Share Acquisitions Chapter of Indiana's new Business Corporation Law, Ind. Code Ann. §§ 23-42-1 to -11 (Burns Cum. Supp.

1986)(the "Indiana Statute") does not regulate or interfere with the acquisition--by tender offer, open market or private purchases or otherwise--of shares of the Indiana corporations it governs. Rather it regulates the circumstances under which a person acquiring control shares of an Indiana corporation is entitled to vote them. Accordingly, the Statute deals with the internal affairs of Indiana corporations, specifically the circumstances under which a person who purchases "control shares" may use the voting power of the shares to exercise influence or control over the corporation.

The questions presented on this appeal--whether a state statute regulating the voting rights of

shareholders of its own domestic corporations is unconstitutional under the Supremacy Clause or the Commerce Clause--are novel and important to the maintenance of the proper role for state regulation of corporations against improper Federal encroachment.

This Court addressed Supremacy and Commerce Clause issues in a substantially different context in Edgar v. MITE Corp., 457 U.S. 624 (1982), in which it held the Illinois Business Takeover Act (the "Illinois Act") unconstitutional. Unlike the Indiana Statute, however, the Illinois Act regulated the takeover bid process itself by imposing a pre-commencement notification requirement on offerors and by permitting a hearing at the election of incumbent management on the adequacy of the offeror's disclosure and the

fairness of its offer. 457 U.S. at 626-27. In sharp contrast, Indiana has refrained from regulating the acquisition of shares of Indiana corporations.

Since this Court's ruling in MITE numerous states, including Indiana, have abandoned statutes containing provisions similar to those of the Illinois Act. Many such states, like Indiana, have determined that the protection existing shareholders of their domestic corporations should have against changes in control of the corporation which they believe to be inimical to their interests, can be provided through the medium of corporate governance.*

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* See, e.g., N.Y. Bus. Corp. Law §§ 912, 1613 (McKinney 1985) (requiring any tender offeror

Particularly in view of the rash of litigation that can be expected

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(footnote continued)

planning to acquire twenty percent or more of a corporation's stock to seek approval from its directors for any future business combination on penalty of being barred from any such business combination for a five-year period); Ky. Rev. Stat. §§ 271A.397-99 (1984); Md. Corps. & Ass'ns Code Ann. §§ 3-601 et seq., 8-301(14) (Supp. 1984); Michigan Comp. Laws §§ 450.1775 et seq. (1984); La. Rev. Stat. Ann. §§ 12-132 et seq. (West Supp. 1985) (all requiring a tender offeror intending a "business combination" following a successful tender offer to either obtain approval from a supermajority of the corporation's voting shares and of those held by the disinterested shareholders or pay a "fair price", often defined as an amount not less than the value of the shareholder's holdings on the day prior to the date of the control transaction, to those nontendering shareholders who are forced to sell in the course of the business combination); Ga. Code Ann. §§ 14-2-232 et seq. (Supp. 1985) (requiring a tender offeror intending a "business combination" following a successful tender offer to either (1) obtain unanimous

concerning the constitutionality of new state statutes which forego regulation of the acquisition of shares, leaving

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(footnote continued)

> approval by the corporation's continuing directors or (2) obtain approval by two-thirds of the continuing directors and by a majority vote of the disinterested shareholders, or to pay a "fair price" to those shareholders who sell in the course of the business combination); Pa. Stat. Ann. tit. 15 §§ 1408, 1409.1, 19.10 (Purdon Supp. 1984-85) (requiring a tender offeror to pay upon demand the fair market value of a stockholder's holdings as of the day prior to the date the control transaction occurred, and to obtain approval by a majority vote of either the disinterested shareholders or of directors independent of the acquirer prior to any second-stage merger or consolidation, unless the consideration paid therefor is not less than the highest amount paid by the interested stockholder in acquiring stock of the same class); Me. Rev. Stat. tit. 13A § 910 (1985) (requiring a purchaser to notify stockholders within 15 days of acquiring twenty-five percent of the corporation's voting shares, and, for thirty days after providing such notice, to purchase upon request any

that for the Williams Act, but regulate the exercise of voting power by the acquirer of shares or regulate other aspects of the relationship between the acquirer and the corporation, this Court should give plenary consideration to the substantial questions presented by this appeal.

I. THE INDIANA STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT.

A. The Indiana Statute

The Indiana Statute applies only to corporations organized under the

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(footnote continued)

stock held by voting shareholders for the fair value of the stock on the day prior to the date of the control transaction); Minn. Stat. §§ 80B.01 et seq. (1984) (requiring a tender offeror to pay the same amount for shares purchased during a subsequent two-year period as was paid to shareholders initially tendering shares).

laws of Indiana with 100 or more shareholders which have their principal places of business, principal offices or substantial assets within Indiana. In addition, subject corporations must have more than ten percent of their shareholders resident in Indiana, more than ten percent of their shares owned by Indiana residents or more than 10,000 shareholders resident in Indiana. Ind. Code Ann. § 23-1-42-4(a).

The Statute governs the voting power of "control shares," defining that term as voting shares that, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three threshholds of voting power. Ind. Code Ann. § 23-1-42-1. Only the control shares themselves, and not shares previously owned by the acquirer, are subject to the provisions

of the Statute. A person who acquires control shares may not vote them until the shares are accorded voting rights by a majority vote of existing disinterested shareholders, that is, all shareholders except the acquirer and the officers and inside directors of the corporation. Ind. Code Ann. § 23-1-42-9.*

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* The Legislature of Indiana did not intend that the Indiana Statute be construed to permit incumbent management to vote on the voting rights issue. While Section 9 is ambiguous in this regard, the Legislature included Section 9(b)(1) only to insure the right of a class to vote as a separate voting group if the proposed control share acquisition would result in any of the changes described in Ind. Code Ann. § 23-1-38-4(a), which relates to changing the provisions of or reclassifying classes of a corporation's stock. Intervenor-Appellant was not able to present evidence to the District Court as to the Statute's proper construction and intent, "[b]ecause

To obtain the necessary shareholder vote, any person who has made or proposes to make an acquisition of control shares may deliver an "acquiring person statement" to the corporation setting forth information similar to that required by the Williams Act, and may request a special meeting of the shareholders to determine whether voting rights will be accorded. Ind. Code Ann. § 23-1-42-6. The corporation must then hold such a shareholders'

(footnote continued)

> the Indiana Attorney General [was not] properly certified pursuant to 28 U.S.C. § 2403(b) . . ." (CTS App. A88). As the Indiana Attorney General informed the Seventh Circuit, CTS has only one class of common stock, and Section 9(b)(1) is thus irrelevant to any shareholder election on the voting rights issue in this case.

meeting within 50 days. Ind. Code Ann. § 23-1-42-7(a).

B. The Williams Act

The Williams Act, 15 U.S.C. §§ 78(m)(d)-78(m)(e), 78(n)(d)-78(n)(f) (1981) (CTS App. A141), was adopted in 1968 as an integral part of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (1981) (the "1934 Act"). It does not purport to govern voting rights of shareholders of corporations organized under the laws of the various states. Rather, the Act requires that upon commencement of a tender offer, the offeror file with the Securities and Exchange Commission (the "SEC"), publish or send to shareholders of the target company and furnish to the target company detailed information about the offer. 15 U.S.C. § 78n(d)(1); 17 C.F.R. § 240.14d-3 (1981). It also

provides that stockholders who tender their shares may withdraw them during the first seven days (now fifteen by SEC regulation, 17 C.F.R. 240.14d-7) of a tender offer and, if the offeror has not purchased them, at any time after sixty days from the commencement of the offer. 15 U.S.C. § 78n(d)(5). All shares tendered must be purchased for the same price and on a pro rata basis if the offer is oversubscribed. 15 U.S.C. §§ 78n(d)(6) and (7).

C. There Is No Conflict Between the Provisions of the Williams Act and those of the Indiana Statute, and the Indiana Statute is Therefore Not Preempted.

As the Seventh Circuit recognized, there is no conflict between the provisions of the Indiana Statute and the provisions of the Williams Act. It is possible for an acquirer to comply with the provisions of both laws when

purchasing control shares of an Indiana corporation. Under such circumstances, the plain language of the federal statute being construed, the 1934 Act, requires a finding that the Indiana Statute is not preempted.

Section 28 of the 1934 Act states that:

> "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1981) (emphasis added).

The provisions of the Indiana Statute, which deal with the voting rights of control shares do not conflict with the "provisions" of the Williams Act. Accordingly, the plain meaning of the language of the statute itself demonstrates that Congress did not

intend that the policy reflected in the 1934 Act be the basis for preempting state laws not inconsistent with the actual provisions of the Act.

This Court has frequently held that the plain meaning of a statute must be given effect and that the legislative history of an unambiguous statute is almost always irrelevant:

> Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from that data would justify a limitation on the 'plain meaning' of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'. Garcia v. United States, 469 U.S. 70, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984) (quoting TVA v. Hill, 437 U.S. 153, 187, n. 33, 98 S.Ct. 2279, 57 L.Ed. 2d 117 (1978)).

Accordingly, this Court should find, in accordance with the unambiguous language of Section 28 of the 1934 Act, that the Indiana Statute is not preempted by the Williams Act, and it thus need not refer to the legislative history of the Williams Act in reaching this result.

D. The Legislative History of the Williams Act Does Not Support the Proposition that the Williams Act Preempts More Rigorous State Takeover Laws.

At a minimum, since there is no direct conflict between the provisions of the two statutes, the test to be applied in determining whether the Indiana Statute is preempted by the Williams Act is "whether, under the circumstances of this particular case [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes or objectives of

Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

Because the subject matters of two statutes are different, the Statute is not preempted unless the Williams Act embodies some Congressional purpose which the Statute thwarts. Despite obvious reservations "stilled" only by the "weight of precedent," the Seventh Circuit sided with the plurality in MITE by holding that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that states may not upset." Dynamics Corporation of America v. CTS Corporation, Nos. 86-1601, 86-1608, slip op. at 21 (7th Cir. June 9, 1986) (emphasis added). (CTS App. A21) In so doing the Seventh Circuit conceded that "[o]f course, it is a big leap from saying that the Williams Act

does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations . . . ." Id. at 22. (CTS App. A22) Indeed, as Judge Posner pointed out, the legislative history states that "[t]he bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" Id. at 23 (emphasis added). (CTS App. A23)

No inference arises from this or other statements on the subject of neutrality in the legislative history of the Act that Congress intended to preempt more restrictive state regulation of takeovers. And the references to neutrality fall far short of the "extraordinary showing of contrary intentions", Garcia, 469 U.S. at ___, 105 S.Ct. at 483, that would

justify the Court in deviating from the plain language of Section 28 of the Act.

This is particularly true in view of the fact that, as this Court recognized in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), in an opinion joined in by seven Justices, the neutrality of the Williams Act is "but one characteristic of legislation directed toward a different purpose--the protection of investors." 430 U.S. at 29. Considering that under the 1934 Act the states are free to enact legislation for the protection of investors which does not conflict with its provisions, it seems apparent that Congress had no purpose in mind other than observing the principle of neutrality in its own takeover legislation.

The Seventh Circuit's opinion itself amply demonstrates that the

fundamental premise it relied upon in resolving the Supremacy Clause issue--that states may not upset the balance struck in the Williams Act--is extremely shaky. And the "weight of precedent," which was evidently the sole factor which convinced the Seventh Circuit not to "reexamine" its own analysis of this issue in sub nom. MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), rests on no firmer foundation.

Lower federal court rulings on the issue derive from the Supreme Court's plurality opinion in MITE. The three Justices constituting the plurality (Chief Justice Burger and Justices White and Blackmun) reasoned in that case that the provisions of the Williams Act, while intended primarily to protect investors, were also intended to "strike a balance between the

investor, management and the takeover bidder." 457 U.S. at 634. The plurality then held that the Illinois Act's pre-commencement notification requirement and hearing provisions upset the balance by introducing delay into the tender offer process during which the target company could take steps to combat the offer. Id. at 634-39. Further, in permitting the Illinois Secretary of State to determine whether the takeover offer was fair, and to refuse to register the offering if he determined it was not, the Illinois Act deprived investors of the right to make their own decisions on the offer as the plurality believed Congress intended. Id. at 639-40.

However, it is far from clear that the Supreme Court would have ruled the same way on the Supremacy Clause

issue in MITE had all of the Justices reached the question. Justices Powell and Stevens refused to join the Supremacy Clause portion of Justice White's opinion, Justice Powell stating that:

> [T]he Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure--at least in some circumstances--greater protection to interests that include but often are broader than those of incumbent management. 457 U.S. at 647.

And in similar language, Justice Stevens wrote:

> I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. 457 U.S. at 655.

Justices O'Connor, Marshall, Brennan and Rehnquist did not reach the Supremacy Clause issue at all.

Because MITE was so inconclusive on the issue of the proper application of the preemption doctrine in the context of the Williams Act and state takeover statutes, there has been confusion in the lower federal courts in dealing with the issue. See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 913 (8th Cir. 1984) ("the [Supreme] Court has not definitely resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger and Blackmun, or some other analysis should apply.") See also L.P. Acquisition Co. v. Tyson, 772 F.2d 201 (6th Cir. 1985); Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1034, 1036 (1st Cir. 1982); and Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 567-68 (6th Cir. 1982). For this reason alone the Court should

give plenary consideration to the issues presented by this appeal.

E. The Indiana Statute Relates to Corporate Governance Issues which Are Not Subject to Preemption by a Federal Statute Regulating Takeover Bids.

Even if the Court were to adhere to the plurality's view in MITE concerning Congress' intent in enacting the Williams Act, the Indiana Statute would not fall afoul of its purpose. The Indiana Statute does not regulate takeover bids. It regulates only the voting rights of control shares, and is thus one of a family of other more common provisions in the Business Corporation Law affecting the relative ease of asserting influence or control over an Indiana corporation after acquiring a substantial block of shares. Such provisions include those relating to cumulative voting (e.g.,

Ind. Code Ann. § 23-1-30-9); provisions permitting the issuance of special classes of stock which can be used to give existing shareholders costly redemption rights in the event of a change of control (e.g., Ind. Code Ann. § 23-1-27-1); provisions giving dissenters in any merger appraisal rights (e.g., Ind. Code Ann. § 23-1-44-1 to -20); and provisions conditioning any merger, sale of substantially all of the assets or dissolution upon a majority vote of the shareholders. Ind. Code Ann. §§ 23-1-40-3; 23-1-41-2 and 23-1-45-2. Indeed, many states permit corporations to require a supermajority vote of shareholders (in some cases up to 80%) to approve mergers and other extraordinary corporate transactions. Del. Code Ann. tit. 8 § 102(b)(4)(Michie 1983). Unless the Seventh Circuit's

holding is reversed, state laws such as these, which relate to the degree of difficulty that an acquirer of stock might have in assuming control over a corporation, are potentially subject to attack as inconsistent with the neutrality policy underlying the Williams Act.

The Indiana Statute, dealing as it does with voting rights of an acquirer after an acquisition of control shares, regulates the internal affairs of Indiana corporations. The plurality in MITE considered the "internal affairs" doctrine which "recognizes that only one State should have the authority to regulate a corporation's internal affairs," 457 U.S. at 645, but held that it was of little use to Illinois in the context of that case. The tender offers regulated by the Illinois Act, the Court

ruled, "contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." Id.

The internal affairs doctrine is, however, squarely applicable in this case. As the court recognized in APL Limited Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985), while the acquisition of shares itself does not implicate the internal affairs of the target corporation, use of the power acquired as a result of the acquisition "once the shares have been acquired may well be a proper subject of state regulation . . . ." 622 F. Supp. at 1223-24 (emphasis in original).

The effect of the opinion below is to federalize a significant portion of the law relating to internal

corporate affairs in contravention of the policies this Court has followed in such cases as Cort v. Ash, 422 U.S. 66 (1975); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) and Schreiber v. Burlington Northern, Inc., 472 U.S. ____, 105 S.Ct. 2458, 86 L.Ed. 2d 1 (1985). As the Court stated in an analogous context in Cort v. Ash:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. 422 U.S. at 84 (emphasis added).

If allowed to stand, henceforth new state laws (and many existing ones)*

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* See, e.g., the statutes cited in the footnote at p. 13, supra, and some of those referred to in the text at pp. 33-34, supra.

relating to corporate governance issues will be subject to attack on the ground that they are not neutral in the battle between aggressor and target for corporate control.

F. The Indiana Statute Does Not Violate Any Policy of Neutrality in Takeover Contests which May Be Imposed by the Williams Act upon the States.

The Indiana Statute reflects state policy that disinterested shareholders of Indiana corporations should have a voice in so fundamental a corporate event as the assumption by an acquirer of voting control over a substantial block of the corporation's stock. By preventing the acquirer and officers and inside directors from voting on the issue of whether the control shares will carry voting rights, the Statute places this decision where it belongs--in the hands of disinterested shareholders who can view

the issue from the point of view of their own self interest.

In holding that the Indiana Statute is preempted by the Williams Act, the Seventh Circuit speculated that as a practical matter the Indiana Statute imposes a fifty-day delay upon an acquirer wishing to consummate an acquisition of control shares--a reference to the period within which the corporation must hold a shareholders' meeting to consider voting rights. (CTS App. A20) There is no basis whatsoever for this conclusion.

Significantly, nothing in the Statute prevents an acquirer from making an offer to purchase control shares that entitles him to accept tendered shares as soon as permissible under the Williams Act, subject to the shares being accorded voting rights within a

specific period of time thereafter. Indeed, the offer could entitle the offeror to consummate the purchase in accordance with the Williams Act time schedule, but contain a provision that if thereafter the shares were not accorded voting rights, the acquirer would have the option to sell the shares back to the tendering shareholders at the price paid. For the offeror's protection under such circumstances, the purchase price could be placed in escrow pending the outcome of the shareholder vote.

As a matter of procedure, a tender offeror could announce a tender offer and file his acquiring person statement with the target corporation the same day. The corporation would be required to call a shareholders' meeting to be held within fifty days and to set

a record date for shareholders entitled to vote. Only shareholders of record are entitled to vote at shareholder meetings of Indiana corporations, and thus those who tendered their shares after the record date in response to the offer would be entitled to vote at the shareholders' meeting to consider the voting rights of the control shares sought. See Ind. Code Ann. § 23-1-29-7. After the waiting period which the SEC has prescribed under the Williams Act and before the shareholders' meeting, the offeror could conditionally accept (or even consummate the purchase of) all shares tendered.

Given a properly structured offer, the Indiana Statute does not delay the acceptance of the shares or the consummation of the offer and thus does not give the target company

"additional time within which to take steps to combat the offer," MITE, 457 U.S. at 635, an evil the plurality in MITE identified in the Illinois Act. Nor does the Statute require the offeror to assume any risk in the event of an adverse shareholder vote. Thus, the Seventh Circuit's conclusion that the Statute delays acceptance or consummation for at least fifty days fails to consider the practical alternatives open to the offeror.

Tender offerors and their professional advisers are undoubtedly in possession of sufficient experience to predict what price is required in given circumstances to prompt disinterested shareholders to tender their shares. It seems self evident that if the shareholder wishes to sell his shares at the price offered he will vote to confer

voting rights on the control shares sought. Thus, there is no basis for Judge Posner's speculation that the "tenderer mercies of the 'disinterested' shareholders" (CTS App. A23) will operate to frustrate tender offerors.

That the Indiana Statute in fact promotes the balance among offerors, shareholders and incumbent management in battles for corporate control is demonstrated by the fact that for the first time a state has given offerors the absolute right to obtain an immediate shareholder vote on the merits of their offers. Incumbent management is required to hold the election but cannot vote its own shares. The effect of this is likely to be that incumbent management will be less able to wage war against an offer the shareholders wish to accept. Once the disinterested

shareholders have voted in favor of an offer, management should be dissuaded from continuing to fight. It certainly would not be able to justify its actions, as many have in the past, on the ground that a tender offer is inherently coercive and that shareholders are left with no choice but to tender their shares. Under the Indiana Statute the will of the majority expressed at a shareholder meeting will control.

Finally, seen in this light, the Indiana Statute also promotes the policy, which the plurality of this Court discerned in the Williams Act, of letting shareholders make their "own informed choice." MITE, 457 U.S. at 634. Whether offerors elect to purchase control shares before or after a vote by the disinterested shareholders on the

voting rights issue, these shareholders themselves will decide the issue of whether the offer is attractive. If the offer is attractive they will undoubtedly confer voting rights.

II. THE INDIANA STATUTE DOES NOT VIOLATE THE COMMERCE CLAUSE.

The second question on appeal to this Court is whether the Indiana Statute violates the Commerce Clause. It is significant in this regard that the Statute does not regulate commerce, but only the voting rights to be accorded to control shares acquired in Indiana corporations. As the provisions of the Statute apply whether the control shares are acquired by a resident or a non-resident and whether in intrastate or interstate commerce, it does not have even the incidental effect of discriminating against interstate

commerce. And, as this Court held in Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) (plurality opinion), state laws which do not discriminate against interstate commerce are entitled to "special deference."

The rights of shareholders in Indiana corporations are determined exclusively by Indiana law. Nothing in the Commerce Clause requires Indiana to resolve corporate governance issues in any particular way so long as the state does not discriminate against interstate commerce. Shares of Indiana corporations are bought and sold in interstate commerce, but whether the shares are more or less desirable to purchasers than shares of other states' corporations is irrelevant to whether the law defining the rights carried by

the shares is constitutional under the Commerce Clause.

A crucial distinction between the Indiana Statute and the Illinois Act struck down in MITE is that the latter regulated transactions in interstate commerce--tender offers for shares of corporations with substantial contacts with Illinois. The Indiana Statute does not regulate transactions, only the voting rights of shares which may be the subject of transactions. And the Seventh Circuit thus erred when it found that "[t]he law in question is an explicit regulation of tender offers." (CTS App. A27) Because Indiana has the right to determine the characteristics of shares of its corporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds.

If applicable at all, the test to be applied in ruling on the "dormant" Commerce Clause issue presented is that set out in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Weighing these two considerations demonstrates that the Indiana Statute was a proper exercise of the state's authority to pass laws relating to corporate governance of its domestic corporations.

A. The Burden, if any, Imposed by the Indiana Statute upon Interstate Commerce is Minimal.

It is obvious from the provisions of the Indiana Statute that

it does not prohibit interstate commerce in shares of Indiana corporations. The Statute does not affect the voting rights of shares other than control shares. Moreover, any investor purchasing control shares for investment may buy the shares and file an acquiring person statement without requesting a shareholders' meeting to determine his voting rights. While such an investor would be unable to vote the control shares acquired, he would be free to sell them to third parties. In the hands of a purchaser, the shares would carry voting rights unless that purchase was itself a control share acquisition.

The Seventh Circuit premised its Commerce Clause ruling upon a belief that the Statute impedes "commerce in corporate control." (CTS App. A26) We have demonstrated above, however, that

the Indiana Statute does not prevent an offeror from acquiring control shares on the same time table and using essentially the same procedures that have become common in contests for corporate control. The only difference is that instead of being able to obtain voting rights with respect to control shares automatically upon consummation of the tender offer, he must await the result of an expedited shareholders' meeting in which those disinterested shareholders to whom the offer is being made will decide that issue by majority vote.

There is no evidence in the record, nor any reason for concluding, that the necessity for such a shareholder vote will deter tender offers for control shares of Indiana corporations, reduce the price offered

for shares in such transactions or otherwise burden or inhibit interstate commerce in such shares. And the speculation in the Seventh Circuit's opinion to the contrary is conclusory and without any foundation. This Court, in reviewing the Seventh Circuit's decision, is free to form its own conclusions concerning the likely effect of the Indiana Statute upon interstate commerce.

In making its review, this Court should consider, as discussed above, that the Indiana Statute may well have the effect of truncating many tender offer battles between hostile aggressor and entrenched management--a result which would enhance interstate commerce in control shares. This Court may take judicial notice of the fact that bitterly fought takeover battles

often last many months. Under the Indiana Statute the aggressor is in the unique position of being able to force a shareholders' meeting and thereby take the issue directly to the shareholders on an expedited basis. In the face of a favorable vote of the shareholders on an offer or proposed offer, management should be extremely reluctant to continue the battle.

In fact, if the Statute is allowed to stand offerors may wish to adopt the strategy of filing an acquiring person statement containing the proposed offer and refraining from incurring the expense of the tender offer itself, and the accompanying litigation, until after the disinterested shareholders have spoken. After the election, the offer, which might otherwise have taken months and

consumed millions of dollars in legal and other professional fees, may be able to proceed without management opposition.

As the foregoing demonstrates, the provisions of the Indiana Statute should not hinder, and in many cases may actually facilitate, the purchase of control shares. Tender offerors and others interested in acquiring control shares for the purpose of controlling or influencing a corporation are typically sophisticated businessmen represented by experienced professionals who are capable of taking advantage of the benefits of the Indiana Statute and eliminating any delay in consummating an offer--all without incurring the risk of buying non-voting stock. This voting rights statute thus should not have been struck down for violation of the Commerce Clause, because any incidental

effect it may have on interstate commerce in control shares is minimal.

For this reason it was error on the part of the court below to hold the Statute unconstitutional on its face on Commerce Clause grounds, especially without an evidentiary hearing at which expert witnesses could testify concerning the practical effect the Statute would have on interstate commerce in control shares.

B. The Indiana Statute Effectuates a Legitimate State Interest, and Its Local Benefits Outweigh Any Incidental Burden on Interstate Commerce.

The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of the disinterested shareholders to determine whether a material change in voting control of the corporation is in their best interests. In regulating this

aspect of corporate governance, the Statute is but an extension of other provisions of the Indiana Business Corporation Law which require shareholder approval of fundamental changes in the corporation, such as a merger with another corporation. Ind. Code Ann. § 23-1-40-3.

During the course of an offer the Statute permits shareholders to evaluate the offer's merits without coercion. If the offer is attractive and a majority wishes to accept it, the offeror will undoubtedly receive the voting rights sought. If, however, the offer is structured as a two-tier offer, with cash for an initial percentage of the corporation's shares and a later component of consideration of questionable value for the remaining shares (such as high risk corporate

bonds), the Indiana Statute permits shareholders to evaluate the merits of the whole without being stampeded into accepting the offer for the initial shares.

Moreover, the Indiana Statute permits shareholders to evaluate the intentions of the offeror to determine whether one seeking a controlling block of the shares will use his voting power in the best interests of the minority shareholders. Whether a shareholder's interests are served by accepting an offer which may result in the purchase of less than all of his shares depends upon how the new controlling shareholder will run the business and whether he will abuse his ability to control the corporation.

Finally, Indiana has a strong local interest in the welfare of

employees of Indiana corporations with headquarters in the State. The Statute permits shareholders to determine the intentions of any offeror concerning the liquidation of the company or its removal from the State. If so inclined, the shareholder may vote against conferring voting control on the control shares in an effort to prevent drastic changes in the conduct of the business which would adversely affect Indiana. See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 912 (8th Cir. 1985) (recognizing that a requirement of Minnesota law that a tender offeror provide information as to the "impacts on the state or its residents of the takeover" was a local benefit because shareholders may wish to take these matters into consideration in deciding whether to tender their shares).

It is noteworthy that the Indiana Statute is far more discriminating in its application than the Illinois Act struck down in MITE. The Statute applies only to corporations organized under the laws of Indiana. Thus, It does not purport to regulate foreign corporations doing business in Indiana, and there is no risk of overlap with the laws of another state which might require offerors to comply with conflicting laws of sister states in proceeding with a tender offer.

The fact that shareholders residing outside of Indiana, as well as those residing within the State, will benefit from the provisions of the Indiana Statute is no reason to hold that local benefits do not outweigh any incidental effect on interstate commerce. The Statute refrains from

regulating the voting rights of control shares unless at least 10% of the shares of tne corporation are held by Indiana residents, 10% of the shareholders are Indiana residents or 10,000 shareholders reside in Indiana. These threshold percentages ensure that the Statute confers local benefits sufficient to survive any Commerce Clause challenge in view of the fact that it should have only a minimal effect on interstate commerce.

The Indiana Statute is thus unlike state takeover statutes which have been struck down for violation of the Commerce Clause because the statutes did not require that any shareholders reside within the state. See Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425 (10th Cir. 1983); APL Limited Partnership v. Van Dusen Air, Inc., 622

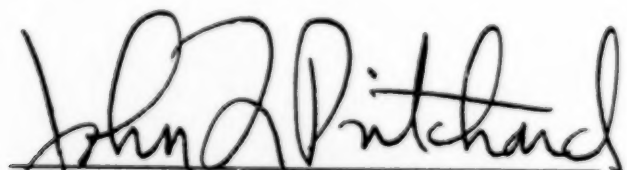
F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985); Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Mo. 1985).

CONCLUSION

Because the federal constitutional issues on this appeal present substantial questions for resolution, this Court should note probable jurisdiction over the appeal and set the case for plenary consideration.

July 22, 1986.

Respectfully submitted,



John F. Pritchard
Counsel of Record for
Intervenor-Appellant

APPENDIX

TABLE OF CONTENTS

NOTE: Other referenced documents are found in the Appendix submitted in connection with the Jurisdictional Statement of Appellant CTS Corporation

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 86-1601

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.

CTS CORPORATION, et al.,

Defendants-Appellants;

and STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 86-C-1624

The Honorable Susan Getzendanner, Judge.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES BY INTERVENOR-APPELLANT STATE OF INDIANA

Pursuant to 28 U.S.C. §1254(2) and Rule 10 of the United States Supreme Court, Intervenor-appellant State of Indiana hereby gives notice of appeal to the Supreme Court of the United States of the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 23, 1986.

The portion of the judgment being appealed from is the holding Indiana Code Chapter 23-1-42, dealing with control share acquisitions, is unconstitutional under the Supremacy Clause, Article VI, clause 2, and the Commerce Clause, Article I, §8, clause 3, of the Constitution of the United States.

This appeal is taken under 28

U.S.C. §1254(2).

Respectfully submitted,

Attorney General of Indiana

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry
Deputy General

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 86-1601

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.

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Defendants-Appellants;

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 86-C-1624

The Honorable Susan Getzendanner, Judge.

PROOF OF SERVICE

I, William E. Daily, a member of the Bar of the Supreme Court of the United States and of the Bar of this Court certify pursuant to rules 10 and 28.5(b) of the United States Supreme Court that I served a true and exact copy of Notice of Appeal to Supreme Court of the United States of Intervenor-Appellant State of Indiana by mail under Supreme Court Rule 28.3 on all counsel of record in this case, addressed to:

Mr. Lowell Sachnoff
Sachnoff, Weaver, & Rubenstein
30 South Wacker Drive
Chicago, IL 60606

Mr. Thomas A. Withrow
Henderson, Daily, Withrow & DeVoe
2450 One Indiana Square
Indianapolis, IN 46204

Mr. Stephen C. Sandels
McDermott, Will & Emery
111 West Monroe Street
Chicago, IL 60603

Mr. Richard E. Deer
Barnes & Thornburg
1313 Merchants bank Bldg.
Indianapolis, IN 46204

this 25th day of April, 1986.

/s/ William E. Daily
William E. Daily

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 86-1601

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.

CTS CORPORATION, et al.,

Defendants-Appellants;

and STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 86-C-1624

The Honorable Susan Getzendanner, Judge.

MOTION TO INTERVENE OF STATE OF INDIANA

Comes now the State of Indiana, by its counsel, Linley E. Pearson, by his Deputy, Arthur Thaddeus Perry, and respectfully moves the Court for leave to intervene as an Appellant in this cause, saying:

1. The District Court has declared a statute of the State of Indiana unconstitutional.

2. At the same time the District Court entered its decision on April 16, 1986, it certified the case to the Attorney General of Indiana pursuant to 28 U.S.C. §2403.

3. The State of Indiana desires to exercise its right to intervene in defense of its statute.

4. On April 17, 1986, undersigned counsel was informed by Mr.

Schroeder of the Clerk's Office that should the State desire to intervene, it could do so and and have until noon on Saturday, April 19, 1986, to file its brief.

5. The State's Brief is being filed simultaneously with the filing of this Motion.

WHEREFORE, the State of Indiana respectfully prays the Court for leave to intervene as a party appellant in this expedited appeal.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry
Deputy Attorney General

Attorneys for Intervenor
State of Indiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and exact copy of the foregoing pleading on all counsel of record in this case, either personally on the 19th, or by mail on the 18th, day of April, 1986.

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 22, 1986.

By the Court:

DYNAMICS CORPORATION OF AMERICA,
a New York Corporation,
Plaintiff-Appellee,

No. 86-1601
v.
CTS CORPORATION, an Indiana
corporation, ROBERT D. HOSTETLER,
GARY B. EREKSON and
JOSEPH DiGIROLAMO,
Defendants-Appellant,
and
STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624
Susan Getzendanner, Judge

This matter comes before the court for its consideration of the "MOTION TO INTERVENE OF STATE OF INDIANA" filed herein on Apeil (sic) 19, 1986.

On consideration thereof,

IT IS ORDERED that the "MOTION TO INTERVENE OF STATE OF INDIANA" is GRANTED and the State of Indiana may participate in this appeal as an intervening appellant.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 18, 1986.

By the Court:

DYNAMICS CORPORATION OF AMERICA,
a New York Corporation,
Plaintiff-Appellee,

No. 86-1601
v.
CTS CORPORATION, an Indiana
corporation, ROBERT D. HOSTETLER,
GARY B. EREKSON and
JOSEPH DiGIROLAMO,
Defendants-Appellant,
and
STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624
Susan Getzendanner, Judge

On the Court's own motion:

1. These appeals are hereby CONSOLIDATED for purposes of briefing and argument.

2. Appellant's requests for expedited appeal are GRANTED. Briefing shall proceed as follows:

a) Appellants' brief shall be filed by 5:00 p.m. on Friday, April 18, 1986.

b) The brief of the Indiana Attorney General, intervenor-appellant, shall be filed by 12:00 noon on Saturday, April 19, 1986.

c) Appellee's brief shall be filed by 1:00 p.m. on Monday, April 21, 1986.

d) Appellants' reply brief, if any, shall be filed by 1:00 p.m. on Tuesday, April 22, 1986.

All briefs must be delivered to the clerk of this court and to counsel by the times and dates specified. Intervenor-appellant may address reply arguments to the court at the time this case is argued.

3. Oral argument in this case will be held on Wednesday, April 23, 1986 at 10:00 a.m., limited to 30 minutes per side. Counsel for appellant and intervenor-appellant should confer on how they wish to divide their time and advise the court of their decision on this matter by April 22, 1986 at 1:00 p.m.